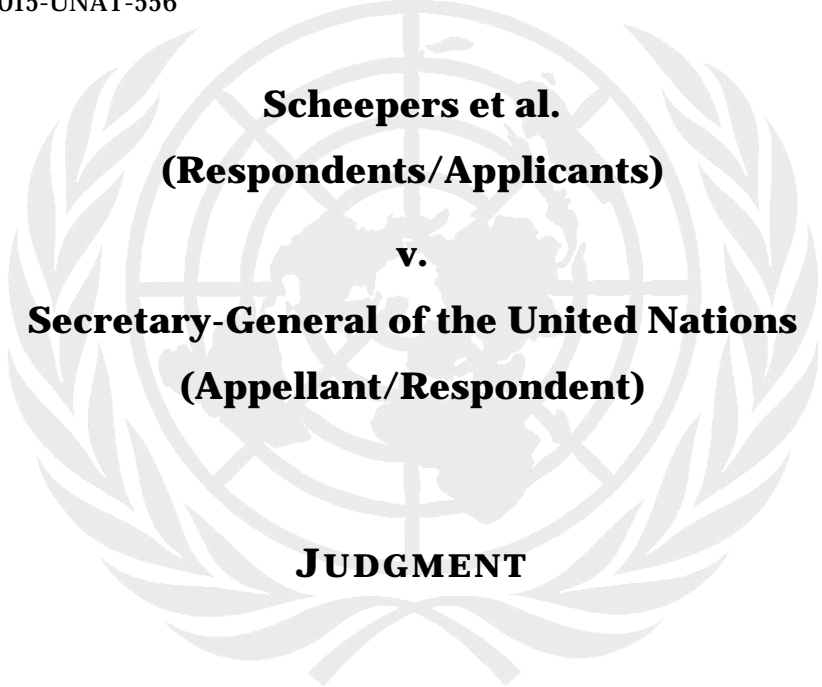




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-556



Scheepers et al.
(Respondents/Applicants)
v.
Secretary-General of the United Nations
(Appellant/Respondent)

JUDGMENT

Before: Judge Mary Faherty, Presiding
Judge Inés Weinberg de Roca
Judge Deborah Thomas-Felix

Case No.: 2014-642

Date: 2 July 2015

Registrar: Weicheng Lin

Counsel for Scheepers et al.: Not represented

Counsel for Secretary-General: Zarqaa Chohan

JUDGE MARY FAHERTY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2014/089, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 26 June 2014 in the matter of *Scheepers et al. v. Secretary-General of the United Nations*.¹ The Secretary-General filed his appeal on 25 August 2014. On 26 August 2014, the Registry served the Secretary-General's appeal on Scheepers et al., four of whom were represented in the proceedings before the UNDT, and notified them that they had 60 days to file an answer. To date none of the members of Scheepers et al. have filed an answer.

Facts and Procedure

2. The five members of Scheepers et al., namely Mr. Wilhelmus Scheepers, Mr. Roren Aitcheson, Mr. Juan Toriano, Mr. Atis Pauksens and Mr. Wojciech Sitarek, were Security Officers at the S-2 level with the Security and Safety Service (SSS) in the Department of Safety and Security (DSS). From 2009 to 2011, Scheepers et al. were all assigned to DSS' K-9 Unit where they held posts at the S-2 level.

3. On 4 June 2010, a staff representative in DSS sent an e-mail to the Chief of SSS on behalf of eight security officers in the K-9 Unit, including Scheepers et al., requesting that they be retroactively paid a special post allowance (SPA) at the S-3 level, and that the security officers' posts be classified.

4. On 9 July 2010, the Chief of SSS replied to the staff representative and indicated, inter alia, that the posts in question were not classified at the S-3 level and that the eight officers were not eligible for SPA while on temporary assignment to the K-9 Unit. The Chief of SSS also stated that a classification study would have to be conducted on a service-wide basis and not unit by unit.

5. Between June and October 2010, SSS consulted with the Office of Human Resources Management (OHRM) and SSS staff representatives as to the minimum seniority requirements for promotion. While it was originally proposed that promotion to the S-3 level should require seven years of experience with SSS, the staff representatives countered with their own assessment

¹ The UNDT consolidated five separate applications by staff members challenging the same issues.

of the promotion requirements and proposed a requirement of five years' service with SSS. This was subsequently retained as the agreed level for promotion.

6. On 8 October 2010, SSS staff were advised of the express work experience requirements by way of memorandum, which stated:

To: All Staff Members of the Security and Safety Service HQ, NY

From: David Bonggi, Chief a.i., Security and Safety Service

Subject: Promotion within the Security and Safety Service "S"
Category

1. Please note that when hiring managers create, Job Openings in Inspira, they are required to enter a desirable number of years of service as part of the evaluation criteria. Hence, Security Officers who apply for posts in Inspira should meet the work experience requirement in order to be further considered.

2. In an effort to find a fair and amicable solution with respect to the "S" category promotions, a thorough analysis was undertaken in consultation with OHRM and the SSS Staff Representative. Based on the "S" category salary scale and ST/IC/1993/66/Add.1 [Placement and Promotion²], the decision was reached to utilize the following table for all "S" promotions within the Security and Service.

S-3 Senior Security Officer – 5 years

S-4 Security Sergeant – 9 years

S-5 Security Lieutenant – 12 years

S-6 Security Captain – 15 years

S-7 Security Inspector – 18 years

Please be guided accordingly.

7. On 3 November 2010, job openings for security officers at different levels from S-3 to S-6 were posted on Inspira as part of the 2010-2011 promotion exercise. The vacancy announcement for Security Officer positions at the S-3 level stated that "[f]ive years of experience [in] all areas of the security operation within the UN Security Service" was required.

8. In December 2010, SSS issued a number of internal bulletins to SSS officers regarding the promotion exercise with information as to how to apply. The bulletin of 23 December 2010 stated that "[b]ased on the 'S' category salary scale and ST/IC/1993/66/Add.1", inter alia, five years' service within SSS was required in order to be eligible for promotion to the S-3 level.

² This statutory instrument had legislated for necessary years of experience for SSS and other staff as a prerequisite for promotion.

9. The last day to apply to the S-3 level post on Inspira was 31 December 2010. Of all the members of Scheepers et al., Mr. Pauksens was the only officer to successfully submit his application for the S-3 level openings.³

10. On 18 March 2011, Mr. Pauksens came to know that those candidates who were identified as suitable were invited to undertake a written assessment by e-mail of the same day. Mr. Pauksens did not receive the invitation e-mail. It transpires that Mr. Pauksens was considered ineligible by the hiring manager as he did not satisfy the minimum requirements for work experience.

11. Between 6 and 15 April 2011, each of the members of Scheepers et al. submitted individual requests for management evaluation of the same issues, namely: (i) the decision not to classify their posts at the S-3 level; (ii) the decision not to pay them SPA at the S-3 level; and (iii) the determination that they were ineligible to participate in the 2010-2011 promotion exercise.

12. On 13 and 18 May 2011, the Under-Secretary-General for Management responded and informed each of the members of Scheepers et al. that the Secretary-General had decided to uphold the contested decisions.

13. In May and June 2011, Scheepers et al. filed individual applications with the UNDT challenging these decisions.

14. On 6 May 2013, by Order No. 124 (NY/2013), the UNDT ordered by consent that the five cases be joined for consideration.

15. From 13 to 17 January 2014 and 29 to 31 January 2014, the UNDT held hearings and on 26 June 2014, the UNDT issued its Judgment. The UNDT found that the challenge by Scheepers et al. to the issue of classification of their posts at the S-3 level, and the issue of the non-payment of SPA at the S-3 level, were receivable but without merit, and were accordingly rejected. Concerning their challenge to the 2010–2011 promotion exercise, the UNDT found that only Mr. Pauksens' claim was receivable; the claims of the remaining members of Scheepers et al. were time-barred insofar as they failed to challenge the five-year requirement which rendered them ineligible to apply for the S-3 level post within 60 days of becoming aware of being rendered ineligible. As to the merits of Mr. Pauksens' challenge, the UNDT found that the

³ Mr. Sitarek and Mr. Toriano did not apply, while Mr. Scheepers and Mr. Aitcheson were unable to submit their application by the deadline of 31 December 2010.

eligibility requirements that were introduced for all S-levels, including the requirement of five years' service within SSS for a promotion to the S-3 level, even if agreed to between DSS staff representatives and managers, were contrary to formally promulgated administrative issuances and public policy, and were arbitrary, manifestly unreasonable and unlawful. In this regard, the UNDT found that the consultations were improperly or insufficiently informed on both sides. Accordingly, the UNDT awarded Mr. Pauksens USD 6,000 as compensation for the loss of a reasonable chance of promotion to the S-3 level as part of the 2010–2011 promotion exercise and the resultant pecuniary loss.

Submissions

The Secretary-General's Appeal

16. The Secretary-General contends that the UNDT erred when it held that the five-year requirement was arbitrary and not based upon any proper considerations. Firstly, relying on *Shamapande*,⁴ the role of the UNDT in conducting a judicial review of a selection process is not to substitute its own judgment for that of the Secretary-General in determining which selection criteria should be used to assess candidates. The Appeals Tribunal has consistently held that in reviewing selection processes the UNDT is to examine only whether the procedures were followed and whether the staff member was given fair and adequate consideration.⁵ The UNDT exceeded its competence in substituting its judgment for that of the Secretary-General in determining that the criteria for the selection of S-3 Senior Security Officers should have been set at a lower number of years of experience.

17. Further, the UNDT also erred in finding that the five-year work requirement was well above the one-year referred to in Section 9.1 of Administrative Instruction ST/AI/2010/3 on the "Staff selection system". Section 9.1 only refers to the minimum period for a post incumbency, which is different from the amount of work experience that may be required for the purpose of obtaining a promotion. Insofar as the UNDT noted that there are no "formally promulgated issuances in the Organization requiring, as a condition of promotion, that any category of staff be employed by the same section or department", staff in the "S" category are unique from "Professional" or "General Service"-level staff, in that they are all security officers of DSS. As

⁴ Former Administrative Tribunal Judgment No. 828, *Shamapande* (1997).

⁵ See *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265; *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122; *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110.

such, the requirement for service within SSS was not unreasonable. In any event, the UNDT exceeded its competence in ruling on this aspect of the five-year work experience requirement, given that Mr. Pauksens challenged that the requirement for five years was too high, not that the requirement limiting relevant experience to service *within* SSS was too restrictive.

18. Lastly, the UNDT had no factual basis to conclude that the decision was arbitrary given the Administration provided extensive evidence to the UNDT that it settled on the five-year requirement after consideration of the requirements of the service and extensive consultations with OHRM and staff representatives. As such, the decision to set a five-year requirement was not arbitrary.

19. The UNDT erred in concluding that the reference in the October 2010 memorandum to ST/IC/1993/66/Add.1, which only required two years of seniority for promotion from the S-2 to the S-3 level, rendered the five-year requirement arbitrary. As ST/IC/1993/66/Add.1 had been abolished, SSS had the discretion to modify the requirements for work experience following consultations with OHRM and the SSS' staff representatives.

20. As the UNDT exceeded its competence and made errors of law in its findings regarding the five-year requirement, its award of compensation to Mr. Pauksens on the basis of these findings was similarly flawed.

21. The Secretary-General requests that the Appeals Tribunal vacate the findings in the UNDT Judgment regarding the unlawfulness of the Administration's decision to impose a five-year work experience requirement for S-3 Senior Security Officers and its award of USD 6,000 as compensation to Mr. Pauksens in respect of his ineligibility for promotion. The remainder of the Judgment should remain undisturbed.

Considerations

22. It was in the context of considering the merits of Mr. Pauksens' challenge to the decision of 18 March 2011, which notified who among the applicants to Job Opening No. 16958 would be invited to undertake a written assessment, that the UNDT determined that the requirement of five years' service for promotion to the S-3 level was unlawful. Before the Dispute Tribunal, Mr. Pauksens argued that the relevant administrative instruction on selection, ST/AI/2010/3, made no reference to time-in-grade or time-in-post requirements for promotion, thus indicating that the same did not apply to matters of staff selection.

Mr. Pauksens also argued that the earlier version of the same instruction, ST/AI/2006/3 (Staff Selection System), had specifically stated that “eligibility requirements regarding time-in-grade and time-in-post that were formally in use shall no longer be applicable”. Mr. Pauksens maintained before the UNDT that the requirement for five years’ service for a promotion from S-2 to S-3 was inconsistent with ST/AI/2010/3 and was not introduced properly, in that it should have been promulgated through a formal administrative issuance.

23. As noted by the Dispute Tribunal, Section 5 of ST/AI/2006/3, which predated ST/AI/2010/3, and discussed “Eligibility Requirements”, provided:

Eligibility requirements regarding time-in-grade or time-in-post that were formerly in use shall no longer be applicable. However, experience, knowledge and institutional memory relevant to the functions must be considered as the personal contribution of the candidate to the achievement of the goals of the Organization and as such are an important element of the selection process.

24. As already stated, the statutory instrument which governed the staff selection system at the time of Mr. Pauksens’ application for Job Opening No. 16958 was ST/AI/2010/3, as argued by the Secretary-General before the Dispute Tribunal.

25. Before the Dispute Tribunal, the Secretary-General also argued that the requirement of five years’ service within SSS in order to be eligible to apply for a promotion from the S-2 level to the S-3 level was, inter alia, the subject of negotiations between management and SSS staff representatives which culminated in an agreement reached on 30 September 2010.

26. Before the Appeals Tribunal, the Secretary-General challenges the UNDT’s finding at paragraph 134 of the Judgment that “the eligibility requirement introduced as part of the promotion exercise held in 2010–2011 was contrary to formally promulgated administrative issuances, including the Organization’s rules on selection, was arbitrary, manifestly unreasonable, and unlawful”. He asserts that the UNDT:

- (i) erred in holding that the five years’ experience requirement for the S-3 position was arbitrary and not based on any proper consideration;
- (ii) erred in concluding that SSS’ references to ST/IC/1993/66/Add.1 rendered the five-year requirement arbitrary;

(iii) erred in finding that the five years' experience requirement was contrary to ST/AI/2010/3 and was required to be set out in a formally promulgated administrative issuance; and

(iv) exceeded its competence in impugning the decision on a ground not argued by Mr. Pauksens.

We will consider each of the arguments in turn.

Did the UNDT err in finding that the five years' experience requirement was arbitrary and not based on any proper consideration?

27. Job Opening No. 16958, which was posted on Inspira between 3 November 2010 and 31 December 2010 and for which Mr. Pauksens applied, stated, *inter alia*:

Work Experience

Five (5) years of experience [in] all areas of the security operation within the UN Security Service, including investigation, physical security, personal protection, strategic and operational planning, fire prevention and suppression, emergency medical and hazardous material response, video imaging badge systems, methods of instruction and related area.

28. With respect to the five years' experience requirement, the UNDT found as follows:⁶

... [A]s part of the 2010–2011 promotion exercise, the discretion afforded under sec. 9.1 of ST/AI/2010/3 to establish a period of in-service eligibility of “normally ... at least one year” was apparently exercised in a way that resulted in the range of *five to eighteen* years of work with SSS. The need for such a lengthy period of service within SSS has not been explained or substantiated to the Tribunal's satisfaction, and is well in excess of what could be considered reasonable, particularly when compared to the language of sec. 9.1, which refers to “one year”.

...

... [T]he Tribunal is not persuaded that the requirement of five years with SSS as a condition for consideration for promotion to the S-3 level was based on any proper considerations, if indeed such requirement could even have been agreed to between the staff representatives and managers, without proper consultation or promulgation. From the evidence available, it was an arbitrary number that was inconsistent with ST/IC/1993/66/Add.1 and was well in excess—for no good apparent reasons—of the

⁶ Impugned Judgment, paras. 121, 125-126 (emphasis in original).

“normal” period of “at least one year”, specified in sec. 9.1. No such comparable requirement of years of service (from five and up to eighteen years) with a particular office or department is reflected in the selection rules for any category of staff, including at the P or D level. There are, quite simply, no formally promulgated issuances in the Organization requiring, as a condition of promotion, that any category of staff be employed by the same section or department for such an extraordinary number of years.

... Apparently, an agreement was reached in or around September 2010 between SSS management and staff representatives regarding the years of eligibility, as reflected in Mr. Schmidt’s email dated 30 September 2010. However, the Tribunal finds that the consultations held were improperly or [in]sufficiently informed on both sides. The Tribunal further finds that, in any event, these requirements are contrary to public policy. SSS staff representatives and management cannot agree to a policy that is not substantiated in any formally promulgated administrative issuances, is contrary to the Organization’s selection rules, and could result in an abuse of discretion, arbitrariness, and unlawfulness.

29. The Secretary-General argues that the UNDT’s reasoning was in error in that Section 9.1 of ST/AI/2010/3 clearly refers to a minimum period for post incumbency, namely the amount of time a staff member is normally required to remain in the same post before he or she is eligible to be appointed to another post. Thus, the Secretary-General contends that the period of post incumbency is different from the amount of work experience that may be required for a particular position.

30. Section 9.1 provides:

Staff members holding a permanent, continuing, probationary or fixed term appointment should normally serve in a position for at least one year before being eligible to be appointed to another position.

31. A plain reading of Section 9.1 of ST/AI/2010/3 supports the argument advanced by the Secretary-General. Thus, insofar as the UNDT regarded Section 9.1 as the barometer against which the designated period of five years’ experience for the purpose of acceding to a position at the S-3 level should be measured, it erred in law in so doing. It follows, given the plain meaning of Section 9.1, that the requirement of five years’ experience in SSS in order to be eligible to apply for an S-3 level position was not inconsistent with the provisions of ST/AI/2010/3, contrary to Mr. Pauksens’ argument before the UNDT. The Appeals Tribunal is of the view that the Dispute Tribunal effectively conflated the requirement for post incumbency as set out in Section 9.1 with the requisite years of experience required

for Job Opening No. 16958. We agree with the Secretary-General's argument that if the UNDT's reasoning were to be accepted, the Organization would be confined to requiring only one year experience for the purposes of promotion exercises, a situation which would be inconsistent with the requirement of Article 101(3) of the Charter to secure the highest standards of efficiency and competence when employing staff.

32. It is also noteworthy that the provisions of ST/AI/2006/3, which repealed the requirement for the number of years of necessary experience for promotion exercises initially prescribed by ST/IC/1993/66/Add.1, itself acknowledged that relevant "experience, knowledge and institutional memory" are, inter alia, "an important element of the selection process". While there is no parallel provision in ST/AI/2010/3, it cannot be the case that matters such as "experience, knowledge and institutional memory" can be deemed to have been rendered redundant by the lack of reference thereto in ST/AI/2010/3, particularly in light of the provisions of Article 101(3) of the Charter, quoted above, and Staff Regulation 4.4, which states that the "Secretary-General may limit eligibility to apply for vacant posts to internal candidates, as defined by the Secretary-General".

33. More particularly, the Appeals Tribunal notes the provisions of Section 4.5 of ST/AI/2010/3, which provides:

The job opening shall reflect the functions [...] and include the qualifications, skills and competencies required. Job openings, to the greatest extent possible, shall be based on generic job profiles approved by OHRM, a previously published job opening or a previously classified individual job description reflecting the actual functions of the position. The evaluation criteria of job openings created on the basis of individually classified job descriptions require approval by a central review body.

34. Furthermore, Section 1 (f) of ST/AI/2010/3 defines "*Evaluation criteria*" as:

[C]riteria used for the evaluation of applicants for a particular position. Evaluation criteria must be objective and related to the functions of the generic job profile or the individually classified job description and must reflect the key competencies that will be assessed[.]

35. Insofar as the UNDT categorized the requirement of five years' experience for the S-3 position as arbitrary and having been imposed without proper consultation, we agree with the Secretary-General's argument that the Dispute Tribunal had no evidential basis upon which to base that conclusion. Paragraphs 36 to 37 of the UNDT Judgment canvassed the consultations and negotiations regarding minimum seniority requirements for

promotions that were ongoing between management and SSS staff representatives in the period of June to September 2010. This engagement culminated in an agreement between management and the staff representatives on 30 September 2010.

36. An e-mail sent by Mr. Schmidt from DSS to Mr. Rosario, one of the SSS staff representatives, on 30 September 2010 with the subject “SSS promotion Exercise-Minimum Seniority in Grade” stated, inter alia, that the parties were able to “arriv[e] at an amicable and fair solution to the vexing problem of seniority in service”. The e-mail noted that “the result of this exercise has been well received amongst the staff representative’s constituencies”.⁷

37. One of the “vexing” issues negotiated between management and SSS staff representatives was the number of years of work experience that was required for promotion to the S-3 level, management having initially proposed seven years with final agreement on five years after such proposal emanated from the SSS staff representatives. In view of the fact that SSS staff were advised by way of memorandum of the express work experience requirements on 8 October 2010, in advance of the publication of the job openings at different levels on Inspira on 3 November 2010, we are satisfied that objective evaluation criteria had been established by the time Mr. Pauksens applied for the S-3 level position.

38. In the present case, the UNDT in effect ruled that the five years’ experience requirement for promotion to S-3 was too high. Absent any proper legal or factual basis upon which to impugn the five years’ experience requirement, the UNDT had no function in substituting its judgment for that of the Administration in determining the criteria for the selection of S-3 officers. Having regard to the consultation and negotiation process that was ongoing from June to November 2010, we find no legal or factual basis upon which the UNDT could properly have concluded that the five years’ experience requirement for promotion to S-3 was arbitrary or not properly considered. In finding that the aforesaid requirement was arbitrary and imposed without proper consultation, the Dispute Tribunal erred in fact resulting in a manifestly unreasonable decision.

⁷ Impugned Judgment, para. 37.

39. In *Ljungdell*, we stated:⁸

... Under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration.

40. In *Abbassi*, we also emphasised that:⁹

... In reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

... The Secretary-General has a broad discretion in making decisions regarding promotions and appointments. In reviewing such decisions, it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process.

41. We are satisfied that the same applies insofar as substituting the Tribunal's own views as to pertinent job criteria for a given post.

The reference to ST/IC/1993/66/Add.1 in the Table attached to Mr. Schmidt's e-mail of 30 September 2010 and in the internal bulletin issued to SSS staff on 23 December 2010

42. The Dispute Tribunal stated:¹⁰

... Notably, when the range of five to eighteen years of service with SSS was introduced in 2010, it was explained by reference to ST/IC/1993/66/Add.1 (Placement and promotion), dated 2 December 1993. See, for instance, the email of 30 September 2010 and the SSS bulletin of 23 December 2010, stating that ST/IC/1993/66/Add.1 formed the basis for seniority requirements.

... ST/IC/1993/66/Add.1 was promulgated in 1993 pursuant to para. 7 of ST/IC/1993/66, which stated that “[f]or staff in the General Service and related categories, the established requirements of minimum seniority in grade will be announced in separate

⁸ *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30 (internal cites omitted).

⁹ *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, paras. 23-24 (internal cites omitted).

¹⁰ Impugned Judgment, paras. 122-123.

circulars. ST/IC/1993/66/Add.1 provided the following requirements for minimum seniority with respect to security personnel:

Information circular

...

Subject: Placement and promotion

1. With reference to paragraph 7 of ST/IC/1993/66 of 2 December 1993 on placement and promotion, the present established requirements for minimum seniority in grade for the General Service and related categories in New York are as follows:

...

Security and Safety

S-1 to S-2 – 2 years

S-2 to S-3 – 2 years

S-3 to S-4 – 3 years

S-4 to S-5 – 3 years

S-5 to S-6 – 4 years

S-6 to S-7 – 4 years

2. Staff members in the General Service and related categories may apply for posts in any of those categories, provided that they meet the requisite seniority and qualifications for the post.

43. The UNDT opined:¹¹

[T]he way in which SSS relied on ST/IC/1993/66/Add.1, even for guidance purposes, was erroneous. ST/IC/1993/66/Add.1 did not state that seniority experience (time-in-service) was to be compounded. For example, for promotion from the S-2 level to the S-3 level, it required “2 years” at the S-2 level, not “five years with SSS”.

It went on to state:¹²

From the evidence available, [five years] was an arbitrary number that was inconsistent with ST/IC/1993/66/Add.1 and was well in excess—for no good apparent reasons—of the “normal” period of “at least one year”, specified in sec. 9.1.

44. The Secretary-General argues that the Dispute Tribunal erred in concluding that SSS’ reliance on ST/IC/1993/66/Add.1 rendered the five-year requirement arbitrary. He referred to the 8 October 2010 memorandum from the SSS Chief to the SSS staff set out at paragraph 6 above. The Secretary-General submits that the SSS Chief’s reference to

¹¹ Impugned Judgment, para. 124.

¹² Impugned Judgment, para. 125.

ST/AI/1993/66/Add.1 was intended to refer to the fact that work experience requirements had previously been established in 1993 and that since the 1993 statutory instrument had subsequently been abolished, the SSS had the discretion to modify the requirements for work experience in light of the subsequent experience of the Office (which indicated that on average, staff served eleven years before promotion) and consequent on the consultations which had taken place with OHRM and the SSS staff representatives.

45. As noted by the UNDT, ST/IC/1993/66/Add.1 was effectively abolished by ST/AI/2006/3, itself superseded by ST/AI/2010/3. However, looking at the backdrop against which the five-year requirement for S-3 promotions was arrived at, in particular the consultation and negotiation process that took place between June and September 2010, the Appeals Tribunal considers that the reference to the 1993 statutory instrument in the 2010 communications and bulletins has to be viewed in the context argued by the Secretary-General, namely it was a springboard against which the years of required experience for various “S”-level posts could be calculated. The overarching factor as of September to December 2010 was that management and staff had negotiated and settled upon the requisite period of service for promotion for each level within the “S” category. As such, the fact that they had referenced a former statutory instrument could not of itself constitute a valid basis upon which to impugn the experience requirements negotiated in September 2010, given the input the SSS staff representatives had in agreeing on the Table attached to the e-mail of 30 September 2010. Accordingly, we find that the UNDT erred in law in deeming the reliance on ST/IC/1993/66/Add.1 “erroneous”. Moreover, we note that in finding the five years’ experience requirement for the S-3 position to be “arbitrary”, the UNDT itself purported to rely on the abolished 1993 instrument by deeming the five-year requirement “inconsistent with ST/IC/1993/66/Add.1”.

Was a formally promulgated administrative issuance necessary to give effect to the SSS promotion requirements?

46. We turn now to whether the UNDT erred in holding that the promotion requirements should have been set out in a “formally promulgated administrative issuance”. With regard to the UNDT’s finding that the Administration could not impose a five-year work experience requirement as it was contrary to ST/AI/2010/3, we have already upheld the Secretary-General’s argument that Section 9.1 of ST/AI/2010/3 refers to post incumbency, a different concept to the requirement for work experience.

47. The Secretary-General contends that since the abolition of ST/IC/1993/66/Add.1 the subsequent generic job profiles for vacancies, including those for SSS posts, included a requirement for experience. The thrust of the Secretary-General's argument appears to be that, having regard to Section 4.5 of ST/AI/2010/3, set out at paragraph 33 above, the work experience requirement was sufficiently clear from the Generic Job Profiles (GJPs) for Security Officers and K-9 handlers at the S-3 level. Section 4.6 of that statutory instrument states:

Each job opening shall indicate the date of posting and specify a deadline date by which all applications must be received. The job opening, including the evaluation criteria, shall be approved by OHRM, the local human resources offices or the Department of Field Support prior to posting.

48. Section 1(*h*) of ST/AI/2010/3 defines a "generic job profile" as a "classified standard job description that encompasses a large group of related jobs with similar characteristics in terms of duties and responsibilities, education, work experience, technical skills and essential core competencies".

49. The GJPs for Security Officers and K-9 handlers at the S-3 level that were approved in May 2008 state, in part:

Experience

Several years of experience in security operations, including in civilian police force, military police, or other relevant military operations.

50. The Secretary-General argues that the five years' experience within the SSS requirement for promotion to S-3 was not inconsistent with the experience provision set out in the relevant GJPs. We are persuaded by the Secretary-General's argument on this point. We are of the view that the absence of a formally regulated issuance on the requirement for work experience as a condition of promotion does not undermine or render unlawful the process ordained for the 2010-2011 SSS promotion exercise.

51. There is no argument before the Appeals Tribunal to suggest that the job openings for Senior Security Officers at different levels which were posted in Inspira on 3 November 2010 were otherwise than in accordance with Sections 4.5 and 4.6 of ST/AI/2010/3. Furthermore, as already alluded to earlier in this Judgment, the years of experience requirements were the subject of consultation and negotiation following which

agreement was reached as to the level of necessary experience within SSS in order to render a staff member eligible for consideration for promotion.

52. In *Charles*, the Appeals Tribunal implicitly recognised the entitlement of the Administration to set minimum experience eligibility criteria for vacancy announcements absent any promulgated issuance on the subject.¹³ In the present case, we see no reason to depart from the approach adopted in *Charles*. In view of all the circumstances, we uphold the Secretary-General's argument that a formally promulgated issuance was not required.

Did the UNDT exceed its competence in determining that the requirement of five years' experience within SSS was too restrictive?

53. The Secretary-General argues that the UNDT exceeded its competence in impugning the Administration's insistence that the required experience be obtained through service within SSS in circumstances where Mr. Pauksens did not seek to impugn the process on this basis. In this regard, the Secretary-General points to Mr. Pauksens' UNDT application which put in issue only the length of time an S-2 staff member had to spend at the S-2 level before being eligible to apply for an S-3 post.

54. We note that the issue of "years within SSS" troubled the Dispute Tribunal and we are satisfied that the UNDT's *ratio decidendi* was based on the number of years an S-2 staff member had to have before being eligible for promotion and the fact that the experience had to be earned *within* SSS. This is clear from paragraphs 125 and 126 of the UNDT Judgment. We do not accept the argument that Mr. Pauksens challenged only the number of years' requirement, although this aspect appears to be more forcefully argued. His UNDT application framed the challenge against "newly implemented desired years *in service* implemented by Program Manager for advertised S-3 post".¹⁴ Accordingly, the Secretary-General's argument on the UNDT's competency is not well founded.

55. However, the Appeals Tribunal accepts the Secretary-General's argument that the UNDT erred in finding that the decision that requisite service had to be accumulated within SSS was unlawful because there were no formally promulgated issuances in the Organization to that effect. We are persuaded that the "S" category staff are unique in the Organization as

¹³ *Charles v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-284.

¹⁴ Emphasis added.

the only staff in the category are security officers. The discretion inherent in the Secretary-General with regard to recruitment and promotion of staff capable of meeting the requirements of Article 101(3) of the Charter must be recognised, absent any procedural infringements or biased or discriminatory practices in such recruitment or promotions. We also accept that Staff Regulation 4.4 expressly states that the Secretary-General may limit eligibility to apply for posts to internal candidates.

56. For the reasons set out in this Judgment, the Secretary-General's appeal is allowed. The UNDT Judgment is vacated in part, namely to the extent that the Appeals Tribunal finds that it erred in law and in fact resulting in a manifestly unreasonable decision in finding that the requirement for an S-2 level staff member to serve five years within SSS in order to be eligible for a promotion to the S-3 level was contrary to ST/AI/2010/3, arbitrary, manifestly unreasonable and unlawful, and consequently awarded damages to Mr. Pauksens.

57. The balance of the UNDT Judgment was not appealed by either party and consequently remains undisturbed by this Tribunal's ruling.

Judgment

58. The appeal is allowed. The UNDT Judgment is vacated in relevant part, as is the consequent award of damages. The remainder of the UNDT Judgment is affirmed.

Original and Authoritative Version: English

Dated this 2nd day of July 2015 in Geneva, Switzerland.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Thomas-Felix

Entered in the Register on this 20th day of August 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar